

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RALPH AND LEONA KERN	:	DETERMINATION
	:	DTA NO. 812127
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law and the Administrative Code of	:	
the City of New York for the Year 1987.	:	

Petitioners, Ralph Kern and Leona Kern, 53 Birchall Drive, Scarsdale, New York 10583, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the year 1987.

A hearing was held before Carroll R. Jenkins, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on December 13th and 14th, 1993 at 9:15 A.M. All briefs were required to be filed by April 1, 1994. Both parties submitted briefs within the prescribed time period. Petitioners appeared by Roberts & Holland (Joseph Lipari, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

ISSUES

I. Whether, for 1987, Ralph Kern spent, in the aggregate, more than 183 days in the City of New York ("the City").¹

II. Whether days petitioner Ralph Kern spent in New York City for purposes of obtaining medical care during 1987 can properly be counted as

¹Petitioner does not dispute that he maintained an apartment in Manhattan and that it constituted a permanent place of abode during 1987.

days in the City for purposes of determining whether he was a statutory resident.

FINDINGS OF FACT

Conceded Issues

(a) During the hearing in this matter, the Division of Taxation ("Division") cancelled tax of \$467.00 plus penalty and interest asserted for 1987 on certain disallowed Schedule "C" business expense deductions of Mrs. Kern.

(b) After the hearing, the Division conceded that both petitioners had established that they were not statutory residents of the City during 1986. The Division's attorney duly executed a Cancellation of Deficiency/Determination and Discontinuance of Proceeding in two related matters, DTA Nos. 812128 and 812129, and all income taxes, penalty and interest asserted for 1986 were cancelled.

(c) In its post-hearing brief, the Division conceded that the proof presented on behalf of Leona Kern demonstrated that she was not a statutory resident of the City of New York during 1987.

(d) Finally, the Division's post-hearing brief conceded that no penalties should be assessed in this matter.

Therefore, the issues, facts and conclusions set forth in this determination relate solely to the tax asserted against Ralph Kern for 1987 (DTA No. 812127).

Ralph Kern ("petitioner") and Leona Kern, his wife, lived and maintained their domicile at 40 Olmstead Road, Scarsdale, New York during 1987.

Petitioner maintained a rental apartment in a building at 40 East 89th Street, New York, New York ("the Manhattan apartment") since at least 1986. The apartment building was owned by Clarendon Management, a family partnership. Mrs. Kern is a partner, with Mr. Kern, in Clarendon Management, although she takes no active role in management of the business.

Mr. Kern owns interests in three income-producing real estate investments in New York City. He is builder and 50% owner of an apartment house at 40 East 89th Street in Manhattan, where the apartment is located. He also built and is 100% owner of an apartment building

located at 211 West 56th Street. Petitioner owns a 50% interest in fee of a parcel of land on which a condominium is constructed at 303 East 57th Street in Manhattan. These properties are all managed by his other company, R. W. Kern, Inc., an S corporation. The company's office is located at petitioner's building at 211 West 56th Street, New York, New York.² Clarendon Management and R. W. Kern, Inc. are sister companies.

Mr. Kern maintains the Manhattan apartment and his business offices in New York City, does his banking in New York City, frequents restaurants in the City and goes to doctors whose offices are located in the City.

Ralph and Leona Kern filed a nonresident New York City personal income tax return (Form IT-203) for 1987 ("the return"). This return, indicated that Mr. and Mrs Kern did not maintain a residence or place of abode in the City of New York.

The Division, acting by and through the New York City Department of Finance and its auditor, Samaan Wassif ("the auditor"), commenced an audit of petitioners' 1987 return. A request for documents was sent to petitioners on January 18, 1990. Among the documents requested by the Division were a copy of the original lease on the Manhattan apartment and a statement showing the amount of rent, who occupied the apartment, who paid the rent and who paid the bills for telephone and utilities (Ex. "I").³

In response, petitioners' accountant, David C. Messenger, C.P.A., wrote the auditor to advise him that the rent, telephone and utilities on the Manhattan apartment were paid by R. W. Kern, Inc. Messenger's letter indicated that the apartment was used by Ralph Kern to rest. "He is not a well individual and requires a place to rest during the day" (Ex. "J"). The letter also indicated that Mr. Kern stayed at the apartment overnight two days per month. A copy of the lease was not provided.

²Also known as and referred to in the record as "1756 Broadway" (tr., pp. 64-65).

³It is unclear from the record how the Division first became aware of the Manhattan apartment.

The auditor requested further documentation to show the number of days petitioner spent within the City during 1987. Mr. Messenger provided a hand-drawn calendar. Each page of this calendar purported to represent a month for 1987 (Ex. "K"). Some of the days on this calendar had notations and some were blank. Mr. Messenger advised the auditor that a "blank" day on the calendar meant that Mr. Kern was at his home in Scarsdale, New York on that day. Subsequently, Joseph Lipari, Esq., joined Mr. Messenger in representing petitioners.

Mr. Lipari provided the auditor with a printed calendar covering the same periods covered by the hand-drawn calendar. This printed calendar also had "blank" days purporting to denote Mr. Kern's presence in Scarsdale.

The calendars and documents provided by petitioners indicated that in 1987 they spent 107 days in New York City and 258 days outside of the City.

Based on the documents provided by petitioners, the auditor computed the numbers of days petitioners spent outside the City in 1987 as follows:

Days that were substantiated:	51
Weekend Days:	72 ⁴
Days allowed without substantiation	<u>23</u> ⁵
TOTAL DAYS SPENT OUTSIDE OF NEW YORK CITY IN 1987:	146

Upon review of petitioner's documentation, the auditor computed petitioner's days in the City for 1987 as follows after allowing the unsubstantiated weekend days and 30% of the unsubstantiated weekdays:

Days Claimed by Petitioner as being in New York City:	107
Additional New York City Days found by auditor based on petitioner's lack of substantiation of non-NYC days:	<u>112</u>
TOTAL DAYS SPENT IN NEW YORK CITY:	219

⁴Since petitioners were domiciled in Scarsdale, unless the documents showed otherwise, petitioners were assumed to be in Scarsdale on weekends.

⁵The auditor allowed 30% of the undocumented weekdays as a reasonable allowance of days spent outside of New York City. This percentage was based on a ratio of documented days in New York City to days spent outside of New York City.

The additional New York City days found by the auditor included 45 days which petitioner claimed to have been in the City for medical reasons.

Petitioner spent several days traveling in 1987. The auditor noted that petitioner failed to report his days of departure and/or arrival (9 days) as days in New York City. These 9 days were included in the auditor's computation of additional days in New York City.

The calendars,⁶ supra, together with some "schedules" purporting to show petitioner's whereabouts on particular days in 1987 (Ex. "31"), were the only evidence provided to the auditor to show petitioner's days outside New York City. The "schedules" were not source documents, but rather were prepared by petitioner's representatives for the audit and for this litigation. The auditor found these documents inadequate, illegible and sometimes contradictory. The auditor concluded that petitioner had failed to satisfy his burden of maintaining and making available for examination adequate records to substantiate the number of days petitioner spent outside of the City.

Based on the fact that petitioner maintained a place of abode in the City, i.e., the Manhattan apartment, and the fact that the auditor computed that petitioner had spent more than 183 days in the City in 1987, the auditor determined that petitioner is subject to taxation as a New York City resident.

On March 15, 1990, the Division issued a Statement of Personal Income Tax Audit Changes to petitioner for 1987 recomputing the tax shown as due on petitioner's filed return. The additional New York City tax, as computed on this statement, was \$86,697.00 plus penalty and interest.

A Notice of Deficiency dated March 16, 1992 was issued to petitioners which asserted additional personal income tax for 1987 in the amount of \$86,697.00 plus penalty and interest.

Petitioners made a timely request for a conference with the Division's Bureau of

⁶Sometimes referred to in the record as "diaries."

Conciliation and Mediation Services. A Conciliation Order (CMS No. 121867) sustaining the notice was issued to petitioners on May 28, 1993.

Petitioners then filed a petition with the Division of Tax Appeals and the instant proceeding ensued.

At the hearing, to prove that petitioner spent less than 183 days in New York during 1987, petitioner's representative put together "calendars" (Exs. "K"⁷ and "30") and "schedules" (Ex. "31") based on Mr. Kern's pocket calendar (Ex. "20") and Mr. Kern's "recollection" of his "pattern of behavior" in 1987 (tr., p. 13). Records relied on by petitioner included: (i) Mr. Kern's American Express Corporate Card ("Amex") receipts (Ex. "23"); (ii) Amex quarterly reports of petitioner's spending (Ex. "L", Ex. "29", Ex. "32"); and (iii) medical bills showing days in 1987 in which petitioner visited his doctor or received medical care in the City as an inpatient or outpatient (Ex. "25").

Leona Kern ("Mrs. Kern") testified that since petitioner's income is derived from his property investments, it is not necessary for him to be in the office every day. Mrs. Kern testified that she and petitioner have much free time which they use, whenever possible, to go sailing. During

1987, due to petitioner's heart ailment, they could no longer sail their own boat, so they chartered boat cruises.

Mrs. Kern testified that she and petitioner leased the Manhattan apartment at a time when it appeared that the building might be converted to cooperative ownership. They have continued to lease the apartment since that time. It was noted in testimony that this apartment had a phone and cable television service listed under the name of Ralph W. Kern. Mrs. Kern did not remember who paid the phone bill or the bill for cable television.

Mrs. Kern testified that during the months of September to April, she and Mr. Kern

⁷Exhibit "K" was the Division's exhibit, but it was prepared and provided to the Division by petitioner.

came into New York City once or twice a week, had dinner at a restaurant and went to the opera.

Mel Farrell ("Mr. Farrell") has been property manager for R. W. Kern, Inc.'s properties since mid-1987. Evelyn Leitch ("Ms. Leitch") was bookkeeper and office manager for R. W. Kern, Inc. during 1987. Mr. Farrell and Ms. Leitch both testified on behalf of petitioner.

Mrs. Kern, Ms. Leitch and Mr. Farrell all testified that petitioner went to his office in the City only one or two times a week during 1987. Mr. Farrell limited his testimony to 1987 and stated that during that year, Mr. Kern "would hardly ever come into the office" (tr., p. 67). Mr. Farrell's testimony regarding petitioner's comings and goings was very general, and did not go into petitioner's whereabouts on specific dates. Neither Mrs. Kern, Ms. Leitch nor Mr. Farrell kept a calendar or diary for showing petitioner's whereabouts on particular days.

Ms. Leitch testified that petitioner was out of the office "most of the summer" in 1987 (tr., p. 101). Ms. Leitch stated that it was not unusual for Mr. Kern to come into the City for a personal appointment and not come into the office (tr., p. 109). She also testified that sometimes petitioner came to the office first and then went to a doctor's appointment. At other times, petitioner would go to his doctor's appointment first and then come to the office (tr., p. 108).

Mr. Farrell, Ms. Leitch and Mrs. Kern were all credible witnesses, but the testimony of each suffered from excessive vagueness, i.e., a lack of specifics.

At the hearing in this matter, the parties stipulated to Mr. Kern's being present in the City on 104 days during 1987. These stipulated days do not include days when petitioner claims he was hospitalized in the City or was in the City to see his doctor. The stipulated days are:

January 5, 6, 7, 16, 19, 21, 22, 24, 27 and 29
February 3, 6, 9, 10, 11, 12, 13, 16, 23, 25 and 27
March 1, 2, 4, 8, 12, 13, 14, 19, 20, 21, 25, 26 and 31
April 1, 3, 6, 7, 9, 10, 20, 21, 22, 23, 24 and 28
May 5, 6, 7, 13, 15, 18, 19, 22 and 23
June 8, 11, 16, 17, 18, 23, 24 and 30
July 3, 6, 7, 8, 13, 22 and 24
September 8, 11, 22, 27 and 30

October 5, 6, 7, 8, 9, 14, 19, 21, 23, 28 and 29
November 3, 5, 9, 13, 17, 18, 19, 20, 25, 27 and 30
December 3, 9, 10, 14, 15, 17 and 21

In addition to the stipulated days (Finding of Fact "28") the record shows that petitioner was hospitalized as an inpatient at The New York Hospital-Cornell Medical Center ("the Hospital") for 11 days during 1987 (Ex. "25").⁸ These days are:

April 29 and 30
May 1, 25, 26, 27, 28 and 29
July 14, 15, and 16

In addition to the days found above (Findings of Fact "28" and "29"), petitioner visited his doctor (in the City) or went to the hospital as an outpatient for consults, laboratory work or to have prescriptions filled (hereinafter collectively referred to as "doctor visits") on 24 days. An asterisk next to a date below indicates that the evidence shows petitioner's presence in the City was for more than one purpose, e.g., restaurant, office on that date (Ex. "30", Ex. "K", Ex. "23", Ex. "32"). These days are:

April 8 and 27*
May 8, 14* and 30*⁹
June 5*, 9, 15*, 19, 22 and 29*
July 2*, 9*, 10, 21, 23, 29* and 30*
September 23
October 20* and 27*
November 12
December 8 and 16

As noted, supra, sometimes petitioner would go to his doctor from his office and sometimes he would go directly from home.

Petitioner testified he went to his office two to three times a week (tr., p. 154). He testified he usually went to the office on Fridays. It was rare, he said, for him to go into the office on Mondays unless he had an appointment (tr., p. 247). There was no need for him to go

⁸Petitioner claims he was hospitalized 12 days, the additional day being May 30th. However, his medical bills show that he was discharged on May 29. He returned to the Emergency Room on May 30th and was treated as an outpatient.

⁹May 30 was petitioner's Emergency Room visit the day following his discharge from the hospital.

to the office every day, since Mr. Farrell managed the properties. Petitioner's main function was to sign checks. Mr. Kern testified that he generally would go to the office on those days where he and Mrs. Kern planned to go to the theater, or to dinner, or had otherwise planned an evening in New York (tr., p. 294).

He testified, and the record supports, that he was not in the City during the month of August 1987, i.e., 31 days, because he and Mrs. Kern were on a cruise.

Due to the lack of documentation to support many of the claimed days outside the City, petitioner and his witnesses rely heavily on testimony that is general in content but attempts to establish petitioner's "pattern of conduct". For example, Mrs. Kern testified that "[i]f he [petitioner] wasn't home he was either on a sailing trip or in [the] hospital" (tr., p. 68).

Petitioner testified that it was not his habit to go into the office on Mondays, because there was nothing to do on Mondays. He may not have gone to the office, but the record shows that he was nevertheless in the City on 34 Mondays out of 52 during 1987.

Petitioner's testimony concerning his whereabouts on particular days was based on his "recollections" assisted where necessary by his various exhibits. Petitioner claims that he was home in Scarsdale (or elsewhere) on 47 days where the record (Ex. "23", "25", "30" for Identification, Ex. "K") shows him to have been in the City:¹⁰

January 8, 15, 26, 30 and 31	
February 18, 19, 21, 24 and 26	March 3, 17, 18, 27
and 30	
April 14 and 15	
May 2, 11 and 21	
June 1, 6, 13, 20 and 27	
July 11 and 28	
September 12, 25 and 28	
October 10, 12, 13, 15, 17, 22, 24 and 31	
November 2, 6, 11, 14 and 21	
December 2, 12, 22 and 23	

In several instances, petitioner's testimony is inconsistent with his own exhibits and

¹⁰Excluding days when he was in the City for medical reasons.

records, particularly Exhibits "23", "32" and Exhibits "K" and "L". Petitioner testified that on February 26 and May 21 he was home because he was having "palpitations", yet his Amex receipts show him to have been in the City on both dates. Petitioner testified that he was home in Scarsdale April 14 and 15 for religious holidays, yet his Amex receipts show him in the City on both dates. Petitioner testified "I would have been home" on September 25th to celebrate Rosh Hashanah (tr., p. 245), but his Amex receipts show him to be in the City on that date. He testified that he was home on October 15 with "no energy", yet his Amex receipts show him to have been in the City. Petitioner testified that on October 22 he was home in Scarsdale except for a visit to his dermatologist in Mt. Vernon, New York. Here again, petitioner's Amex receipts place him in New York City. Petitioner testified that he would not have gone into the City on November 11, because that was Veterans day. His Amex receipts place him in the City on November 11.

Exhibit "K" was prepared and provided by petitioner to the Division's auditor for audit purposes. One of the ways Exhibit "K" indicated that petitioner spent a day in the New York City office was by writing the word "office". Exhibit "30" for identification which was also prepared by petitioner and offered as a purported summary of the evidence failed to include 16 of these "office" days from Exhibit "K". Petitioner did not offer proof to show that he was not in the City during these 16 days. Where Exhibit "K" set forth an "office" day, in the absence of proof to the contrary, it has been treated as an admission by a party and deemed a day in the City. Accordingly, it is found that in addition to the days in New York City found, supra, (Findings of Fact "28", "29", "30"), petitioner was present at his New York City office for an additional 16 days:

January 26
March 5
April 2 and 13
May 4
June 2 and 25
July 1, 17 and 27
September 28
October 2
November 10, 23
December 1 and 8

In addition to the days found in Findings of Fact "28", "29", "30" and "35", it is determined based on Amex records that petitioner was in the City for 48 days (Ex. "23", "32" and Ex. "L"):

January 8, 9, 15, 30 and 31
February 18, 19, 21, 24 and 26
March 3, 17, 27 and 30
April 14, 15 and 16
May 2, 11 and 21
June 1, 6, 13, 20 and 27
July 11 and 28
September 12 and 25
October 10, 12, 13, 15, 17, 22, 24 and 31
November 2, 6, 11, 14, 15, 21 and 24
December 2, 12, 22 and 23

Petitioner was in the City during 1987 for a total of 203 days (Findings of Fact ""28", "29", "30", "35" and "36"). This total includes petitioner's presence in New York City as a hospital inpatient (11 days) as well as his outpatient or doctor visits in New York City (24 days).

SUMMARY OF THE PARTIES' POSITIONS

Petitioner, relying on Stranahan v. New York State Tax Commn. (68 AD2d 250, 416 NYS2d 836), argues that any day in which he went to a doctor's appointment or received medical care as a hospital inpatient or outpatient in the City cannot be counted as a day in New York City for purposes of determining whether he is a statutory resident for income tax purposes.

The Division disagrees and argues that petitioner's argument goes beyond the holding of Stranahan.

The Division argues that petitioner has failed to maintain and make available for review, documentation to prove that he did not spend more than 183 days in the City of New York during 1987, and therefore, he is subject to tax as statutory resident.

Petitioner states that:

"[T]estimony as to one's normal pattern of activity and course of conduct, together with extensive documentation consistent with such testimony, relieves a taxpayer from having to prove by documentary evidence or testimony where he was every day of the year" (Petitioner's brief, p. 11).

Petitioner also argues that penalties in this matter should be abated. The Division agrees.

CONCLUSIONS OF LAW

A. Under Administrative Code of the City of New York § 11-1705(b)(1)(B), a taxpayer is considered a resident for New York City income tax purposes when the individual:

"is not domiciled in this city but maintains a permanent place of abode in this city and spends in the aggregate more than one hundred eighty-three days of the taxable year in this city"

B. 20 NYCRR former 102.2(e)(1) defines "permanent place of abode" as:

"[A] dwelling place permanently maintained by the taxpayer, whether or not owned by him, and will generally include a dwelling place owned or leased by his or her spouse."

It is undisputed that the apartment at 40 East 89th Street, New York, New York was a place of abode permanently maintained by petitioner in the City during 1987. Therefore, in order to decide whether the Division properly held that petitioner was a resident individual for 1987, it must be determined whether or not Mr. Kern spent, in the aggregate, more than 183 days in New York City during that year.

C. Petitioner has the burden of proving by clear and convincing evidence that he was not residing in New York City for more than 183 days during 1987 and 1988 (see, Matter of Kornblum, Tax Appeals Tribunal, January 16, 1992, confirmed 194 AD2d 882, 599 NYS2d 158; Matter of Moss, Tax Appeals Tribunal, November 25, 1992).

20 NYCRR former 102.2(c) provides, in part, as follows:

"Any person domiciled outside New York State who maintains a permanent place of abode within New York State during any taxable year, and claims to be a nonresident, must keep and have available for examination by the Tax Commission adequate records to substantiate the fact that he did not spend more than 183 days of such taxable year within New York State" (emphasis added).

Petitioner states that:

"[T]estimony as to one's normal pattern of activity and course of conduct, together with extensive documentation consistent with such testimony, relieves a taxpayer from having to prove by documentary evidence or testimony where he was every day of the year" (Petitioner's brief, p. 11; emphasis added).

The burden of proof imposed on petitioner by Tax Law § 689(e) is not so easily satisfied.

First, the documentation in this case is far from "extensive." Except for petitioner's pocket calendar, Amex records and medical bills, much of the "evidence" is nothing but schedules created by petitioner for this litigation (see, Ex. "31" for Identification). Secondly, petitioner's testimony in this matter is frequently not "consistent" with the documentation that was placed in the record. Finally, it is difficult to see how anyone could determine the number of days this petitioner was in New York City based on any "pattern of conduct" testified to in this case. That is especially true where, as here, the testimony of the petitioner is frequently impeached by his own documentary evidence.¹¹ The reason that the regulations require a taxpayer to maintain records sufficient to establish that he was in the City for less than 183 days is because even the best memories fade with the passage of time. A person's "recollection" is not a substitute for adequate records. Except in the rarest of cases, a person's "recollection", without more, could not rise to the standard of clear and convincing evidence.

Testimony to establish a petitioner's pattern of conduct may certainly be relevant, and in an appropriate case such testimony may, where consistent with other evidence in the record, be sufficiently credible and probative of a material fact to constitute clear and convincing evidence. This is not such a case.

D. Tax Law § 697(a) empowers the Commissioner of Taxation and Finance to make such rules and regulations he may deem necessary to enforce the provisions of Article 22. An interpretation or construction of a statute by an agency charged with its administration will be upheld if it is not irrational or unreasonable (Matter of Lumpkin v. Dept. of Social Services, 45 NY2d 351, 408 NYS2d 421, 423, appeal dismissed 439 US 1040, 58 L Ed 2d 700). The regulations provide that in calculating the number of days spent within and without New York, the taxpayer's presence within New York for "any part of a calendar day constitutes a day spent within New York" (20 NYCRR 105.20[c]). The Appellate Division has upheld the regulation's

¹¹This is not to suggest any improper motive or purpose of evasion on the part of any witness in this case. I have no doubt that the testimony of petitioner and the other witnesses was accurate to the best of their ability considering the number of years that have elapsed since 1987.

general rule that a "day" for the purpose of calculating the 183-day requirement includes a "presence within New York State for any part of a calendar day" (Matter of Leach v. Chu, 150 AD2d 842, 540 NYS2d 596, appeal dismissed, lv denied 74 NY2d 839, 546 NYS2d 544 [upholding 20 NYCRR former 102.2(c)]). The only exception in the regulation to this general rule is the situation where a taxpayer is present in New York solely for the "purpose of boarding a plane, ship, train or bus for travel to a destination outside New York State, or while traveling by motor, plane or train through New York State to a destination outside New York State" ("the travel exception") (20 NYCRR former 102.2[c]). The evidence in this case regarding the location of petitioner's arrivals and departures on his various trips is ambiguous at best. Therefore, this exception to the general rule has not entered into this determination.

E. In addition to the travel exception, the courts have carved out a second exception to this general rule in Stranahan v. New York State Tax Commn. (supra). This wealthy taxpayer ("Mrs. Stranahan") was domiciled in Palm Beach, Florida and, in 1969, leased an apartment in New York City ("NYC apartment"). Mrs. Stranahan maintained the NYC apartment because she disliked hotels. She used this apartment only occasionally, for a few days at a time, when she was in the City. In 1973, Mrs. Stranahan became ill while traveling in Mexico. Sloan Kettering Memorial Hospital ("Sloan Kettering") in New York City offered the most advanced treatment for her condition, so she traveled to the City on February 20 and was immediately admitted to Sloan Kettering.

Stranahan remained in the hospital approximately one month and was discharged on March 29, 1973 on a strict regimen of medication and treatment. She wanted to return to her Florida home, but her doctors advised against it. She stayed at her New York City apartment until she was readmitted to the hospital on April 25. She remained in the hospital for two months and then was again discharged in June, the doctors still denying her permission to return to Florida. In July, Stranahan was readmitted to the hospital in a semi-comatose condition. She remained there until she died in September. During 1973, she was in New York City for 215 days, of which she spent 148 days in the hospital and 67 days in her apartment.

Stranahan's estate argued, in pertinent part, that she was not taxable as a statutory resident because: (i) her apartment was similar to a vacation cottage and was not a permanent place of abode; and (ii) that Stranahan was detained in New York by her medical condition and her doctor's orders and was not here voluntarily, and accordingly, the days spent in the hospital could not be used in calculating the number of days in New York.

The Appellate Division held that the apartment was a permanent place of abode. However, regarding the second issue, the court noted that there is no difference between an employee domiciled in another state and assigned to his/her employer's office in New York for a fixed and limited period for the accomplishment of a particular purpose and:

"an individual domiciled in another state who comes into the State for the limited purpose of obtaining medical treatment and is prevented from leaving the State before the expiration of 183 days by reason of physical condition and her inability to return to Florida" (*id.*, at 836, 839; emphasis added).

The issue raised by the Stranahan estate was whether time spent in the hospital could be counted as a day in New York City. The court's holding was appropriately limited to answering that question. The court reversed the State Tax Commission and held that:

"when a nondomiciliary seeks treatment in New York for a serious illness, the time spent in a medical facility for the treatment of that illness should not be counted in determining whether such a nondomiciliary was a resident of the State for income tax purposes during such confinement" (*id.*; emphasis added).

F. The 11 days petitioner spent as an inpatient at the New York hospital cannot be counted as days spent in New York City for purposes of determining whether petitioner was a statutory resident for income tax purposes. Contrary to petitioner's argument, however, the days when he visited his doctors or was an outpatient, etc., he was not "prevented from leaving" and, for the majority of such days, it was not the sole reason petitioner was in the City. In any event, the holding in Stranahan is expressly limited to periods when an individual must spend time "in a medical facility for treatment" (*id.*).

G. Petitioner was present in New York City for a total of all or a portion of 203 days (Finding of Fact "37"). From this total must be deducted the 11 days petitioner was in New York City solely for the purpose of receiving medical care as a hospital inpatient (Stranahan v.

New York State Tax Comm., supra), leaving a balance of 192 days in which petitioner was present in New York City. Accordingly, petitioner was a statutory resident of the City of New York for income tax purposes during 1987.

H. In accordance with matters conceded by the Division, supra, tax of \$467.00 plus penalties and interest assessed for 1987 on certain of Mrs. Kern's disallowed Schedule "C" business expense deductions are cancelled.

I. Inasmuch as the Division and petitioner agree that reasonable cause exists for the abatement of statutory penalties, all of such penalties are cancelled.

J. The petition of Ralph Kern is granted to the extent set forth in Conclusion of Law "I", and is otherwise denied, and the Notice of Deficiency dated March 16, 1992, as modified by Conclusion of Law "H", is sustained.

DATED: Troy, New York
September 8, 1994

/s/ Carroll R. Jenkins
ADMINISTRATIVE LAW JUDGE